

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

VINCENZO DiDOMENICIS,	§	
	§	No. 678, 2011
Defendant Below,	§	
Appellant,	§	
	§	Court Below: Superior Court
v.	§	of the State of Delaware,
	§	in and for Sussex County
STATE OF DELAWARE,	§	
	§	Case Number: 0911004362
Plaintiff Below,	§	Cr. A. No. 09-11-0625-0653
Appellee.	§	

Submitted: July 5, 2012  
Decided: August 13, 2012

Before **HOLLAND, BERGER, JACOBS** and **RIDGELY**, Justices and **STRINE**,  
Chancellor,\* constituting the Court *en Banc*.

Upon appeal from the Superior Court. **AFFIRMED.**

Bernard J. O'Donnell, Esquire (*argued*), Office of the Public Defender, Wilmington,  
Delaware, for Appellant.

Paul R. Wallace, Esquire (*argued*), and Gregory E. Smith, Esquire Department of  
Justice, Wilmington, Delaware, for Appellee.

**BERGER**, Justice:

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\*Sitting by designation pursuant to art. IV, § 12 of the Delaware Constitution and Supreme Court  
Rules 2 and 4(a) to fill up the quorum as required.

In this appeal from a driving under the influence (DUI) conviction, we consider whether a prosecutor's misconduct deprived the appellant of a fair trial. The prosecutor's opening statement admonished the jury about the dangers of drunk driving, and the need to protect everyone on the road. In addition, the prosecutor pointed out that people who are arrested for DUI may have been arrested seven times before. The State concedes that the prosecutor's opening statement was improper, but argues that his comments did not amount to plain error. We are troubled that, after years of decisions addressing improper prosecutor statements to the jury, the State made such a basic error. Nonetheless, we conclude that the prosecutor's comments do not warrant reversal in this case.

### **Factual and Procedural Background**

On the evening of November 6, 2009, Vincenzo DiDomenicis entered the Atlantic Liquors store in Rehoboth Beach, Delaware, and tried to buy some beer. The cashier, Liubou Straltsova, noticed that DiDomenicis's eyes were red and that he smelled of an alcoholic beverage. She asked him whether he had been drinking, and he said yes. Straltsova then told him that she was sorry, but that she could not sell him any beer. DiDomenicis asked Straltsova to call her manager, Dennis Norwood. When Norwood appeared, he saw that DiDomenicis was "obviously intoxicated."<sup>1</sup>

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<sup>1</sup> Appellant's Appendix at A-63.

As Norwood walked DiDomenicis out of the store, Norwood explained that he would have to call the State Police if DiDomenicis were going to drive in his condition.

DiDomenicis said that he was not driving, and that some unidentified person “over there” had driven him to the store.<sup>2</sup> But Norwood called 911 because DiDomenicis started to get into the driver’s side of a pickup truck parked in front of the liquor store. When DiDomenicis saw that Norwood was on his cell phone, DiDomenicis got out of the truck and walked across the street to a Pizza Hut store. He and a male Pizza Hut employee returned to the truck at about the same time that the police arrived.

Delaware State Police Trooper Lewis G. Kester, III responded to the 911 call. Kester testified that as he drove into the Atlantic Liquors parking lot, he saw DiDomenicis in the driver’s side of the truck. Kester then saw DiDomenicis “scooch” over to the passenger side, and get out of the truck.<sup>3</sup> DiDomenicis immediately told Kester that he had not been drinking or driving. But Kester noticed that there was a key in the ignition. Another officer, Trooper Philip Kebles, arrived on the scene and stayed with DiDomenicis while Kester went into the store to look at a surveillance video. The video showed DiDomenicis driving into the parking lot,

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<sup>2</sup> Appellant’s App. at A-66.

<sup>3</sup> *Id.* at A-105.

and entering the store. No one else was in the truck, and no one else accompanied DiDomenicis inside the store.

After watching the video, Kester asked DiDomenicis to perform field sobriety tests. DiDomenicis refused and Kester placed him under arrest. Blood testing revealed that DiDomenicis's Blood Alcohol Content was .12 grams per milliliter.

DiDomenicis testified that his girlfriend drove the truck to the liquor store. He also testified that when Norwood said that he would call the police, DiDomenicis walked out of the store and across the road to the Pizza Hut store. He was waiting for his girlfriend there, and drinking beer with his friends. But DiDomenicis could not find his girlfriend, so he returned to the liquor store parking lot. By the time he got there, the police had arrived, so there was "no way" that he was in the truck.<sup>4</sup>

The jury convicted DiDomenicis of DUI, and this appeal followed.

### **Discussion**

The only issue on appeal is whether the prosecutor's improper comments deprived DiDomenicis of a fair trial. During his opening statement, the prosecutor said:

When you get a license and you have the ability to operate a motor vehicle, you have a great responsibility, and that responsibility is to yourself, obviously, but also to every other driver on the road.

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<sup>4</sup> *Id.* at A-217.

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Every day . . . we see articles and videos about people who get arrested for DUI. Sometimes their first; sometimes their seventh or more; sometimes they've been pulled over thanks to a citizen who called 911 or an alert police officer; sometimes because they cause property damage, or they have injured themselves or others.

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The DUI law was created to safeguard the lives of every citizen on the roads of the State of Delaware. When the General Assembly wrote the DUI law, they wrote it to encompass not just the most minimal conduct possible, driving down the road, but the broadest spectrum to provide the maximum protection to the citizens of this state.

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Why so broad? Why not just the people driving down the road? Because the goal is to stop people who are under the influence before they drive away and cause havoc on our roads.<sup>5</sup>

Because DiDomenicis did not object to these comments, we review for plain error, which is error that is “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”<sup>6</sup>

More than 30 years ago, in *Hooks v. State*,<sup>7</sup> this Court discussed several improper statements made during a closing argument. One was the prosecutor's

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<sup>5</sup> *Id.* at A-37-39.

<sup>6</sup> *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

<sup>7</sup> 416 A.2d 189 (Del.1980).

argument about the societal consequences of a not-guilty verdict. This Court held:

[It is] impermissible for a prosecutor to divert the jury's attention from the specific issue of a defendant's guilt or innocence by referring at length to the larger concerns and interests of the community at large . . . , and the social consequences of the verdict. A verdict must not be inspired by considerations outside the legitimate factual parameters of the case as presented.<sup>8</sup>

This Court reinforced the *Hooks* holding in *Black v. State*<sup>9</sup>:

For a prosecutor to urge a jury to convict a defendant in order to prevent the local community from becoming as violent as another locale is objectionable for a number of reasons . . . . [T]o appeal to the jury's fear that a failure to convict may increase violence in their community suggests a personal risk to the juror . . . . [T]o direct the jury's attention to a societal goal of maintaining a safe community is to direct their view from the task at hand. There is no higher societal goal for a juror in a criminal case than the determination of guilt or innocence on an individualized basis.<sup>10</sup>

More recent decisions repeat the same refrain.<sup>11</sup>

As the State concedes, the prosecutor's comments, about the need to keep drunk drivers off the road to protect us all from the "havoc" they cause, were improper. It also was improper to suggest that DiDomenicis may have been convicted of DUI many times before. That comment not only appealed to the jury's

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<sup>8</sup> *Id.* at 205.

<sup>9</sup> 616 A.2d 320 (Del. 1992).

<sup>10</sup> *Id.* at 324.

<sup>11</sup> *Williamson v. State*, 1998 WL 138697 (Del. Supr.); *Hunter v. State*, 815 A.2d 730 (Del. 2002).

sense of personal risk, but also prejudiced DiDomenicis by falsely suggesting that he had a long history of drunk driving.

Thus, there is no question but that the prosecutor failed to adhere to this Court's holdings and the American Bar Association's standards governing prosecution and defense functions.<sup>12</sup> The only question is whether that failure requires reversal. In *Hughes v. State*<sup>13</sup> this Court identified three factors to consider in deciding whether prosecutorial misconduct is reversible error: "the closeness of the case, the centrality of the issue affected by the (alleged) error, and the steps taken to mitigate the effects of the error." In *Hunter v. State*,<sup>14</sup> the Court added a fourth factor – whether the improper comments were a repetition of the type of comments previously held to be improper. Because DiDomenicis did not argue that the fourth factor from *Hunter* applies, the Court will not consider it.

Reviewing the three factors, we conclude that the prosecutor's improper statements did not deprive DiDomenicis of a fair trial. The record evidence establishes that this was not a close case. Two totally disinterested witnesses and a police officer testified that DiDomenicis was very intoxicated. DiDomenicis's blood

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<sup>12</sup> See *Hunter v. State*, 815 A.2d at 735 ("[P]rosecutor should abide by the American Bar Association standards . . .").

<sup>13</sup> 37 A.2d 559, 571 (Del. 1981).

<sup>14</sup> 815 A.2d at 738.

alcohol test was well above the legal limit of .08 grams per milliliter.<sup>15</sup> A store surveillance tape showed that DiDomenicis drove to Atlantic Liquors, and Kester saw DiDomenicis behind the wheel of the truck with the key in the ignition. DiDomenicis's testimony arguably added to the strength of the State's case, as he claimed his girlfriend drove and that he waited for her at the Pizza Hut but could not find her. The girlfriend never testified, and DiDomenicis did not explain how a person could disappear inside a Pizza Hut store.

The improper prosecutor comments were not central to the case. The prosecutor's opening statement focused the jury's attention on the importance of keeping drunk drivers off the road, and the dangers they present to all of us. But the issue presented to the jury was whether DiDomenicis was driving, or was in control, of the truck while intoxicated. DiDomenicis's defense was that he had not driven at all. He offered no corroboration of his story, so the jury had to decide whether to believe DiDomenicis or the State's witnesses. The prosecutor's improper comments were not directed at DiDomenicis's credibility. It is therefore unlikely that they would have had any significant effect on the jury.

Finally, DiDomenicis did not object, and the trial court did not intervene *sua sponte*. As a result, the court took no immediate steps to mitigate the prosecutor's

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<sup>15</sup>See 21 Del. C. § 4177.



error. But the jury instructions included the standard instruction to disregard the attorneys' personal opinions. The instruction concludes:

Further, what an attorney states in his or her opening or closing arguments is not evidence. Evidence consists of testimony from witnesses testifying from the witness stand and exhibits introduced through their testimony. It is this evidence only which you may consider in reaching your verdicts.<sup>16</sup>

It would have been better if the trial court had interrupted the prosecutor's opening statement and given a curative instruction at that time. The general instruction quoted above, however, provided mitigation.

### **Conclusion**

Based on the foregoing, the judgment of the Superior Court is affirmed.

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<sup>16</sup> Appellee's Appendix at B-16.